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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962.

No. 435

HARRIS TRUCK LINES, INC., A CORPORATION,
Petitioner,

vs.

CHERRY MEAT PACKERS, INC., A CORPORATION,
Respondent.

REPLY TO BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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This reply is impelled by Petitioner's belief that Respondent's brief has not reached the real issues of this case, but rather attacked matters largely collateral.

I. The Issue Is the Validity of an Extension Granted by the District Court Under Rule 73(a), F. R. Civ. P. Within the Original Appeal Period, Not Whether Filing a Notice of Appeal May Be Initiated After the Appeal Period Has Expired.

Petitioner, in its petition for a writ of certiorari, sought to make clear that the issue here is whether an extension of time for filing the notice of appeal granted within the

thirty-day period in which notice of appeal may be filed as a matter of right should be judged by the same standards as an extension granted after the time for filing a notice of appeal as a matter of right has expired. Petitioner believes that the situations are basically different because an attorney, failing to receive an extension of time during the original 30-day appeal period, may then protect his client by filing a notice of appeal of right and without order of court (although he may lack authority to do so). Petitioner relied on the validity of an extension granted within the original appeal period and filed its notice of appeal only within the time granted by the extension.

The cases cited by Respondent on the issue fall into two categories: those in which no extension of time to appeal under Rule 73(a) is involved and those in which the request for extension of time was made after the period for appeal of right had expired. The only attempt to meet Petitioner's argument is the flat statement that "Rule 6(b) itself and the decisions of Courts are to the contrary." (Brief in Opposition p. 11.) The force of this contention is somewhat vitiated by the total absence of any supporting authority. Had Respondent sought authority on the issue, it might, in addition to the cases contrary to its position cited by Petitioner, have referred to *Plant Economy, Inc.* v. *Mirror Insulation Co., Inc.*, 308 F. 2d 275 (3d Cir. Nov. 12, 1962), cited by Respondent only two paragraphs earlier. There Chief Judge Biggs stated pointedly:

> "An extension of time for the taking of an appeal, granted *ex parte* after the expiration of the original appeal period, is inconsistent with provisions of Rule 6(b) and Rule 6(d). Before the expiration of the original thirty-day period, the court could have extended the appeal period with or without motion or notice. But since no order extending the appeal period was made until after the thirty-day period had expired, the court was without authority to act *ex parte*. This

was the conclusion reached in North Umberland Mining Co. v. Standard Acc. Ins. Co., 193 F. 2d 951, 952 (9th Cir. 1952) based upon reasons which appear to us to be unassailable."

It might also be noted that Petitioner also cited on this question the opinion of the Tenth Circuit in *Cohen v. Plateau Natural Gas Co.*, 303 F. 2d 273 (10th Cir. May 1, 1962). Certiorari was denied in this case on October 8, 1962. The cases cited by Petitioner as well as Respondent's apparent inability to find support for his contrary assertion (for which we believe none is available), make it crystal-clear that there is a distinction between extensions of time for the taking of an appeal granted before and after the original appeal period. This distinction required the Court of Appeals to give substantial weight to the district judge's ruling which it failed to do.

II. Compliance With Rule 77(d) Does Not Make Rule 73(a) Inapplicable.

Respondent argues that since the notice required by Rule 77(d) was admittedly received by Petitioner's attorney, Rule 73(a) can have no application. (Brief in Opposition pp. 9, 10.) Such a view would, in effect, write Rule 73(a) out of the Federal Rules of Civil Procedure. Rule 77(d) provides only that failure to send a notice does not affect the time for appeal unless the party failed otherwise to learn of the entry of judgment. It would be an unwarranted extension of the Rule to conclude that this negative language also means that if a clerk's notice is received by the party's attorney, there can be no application of Rule 73(a), even though the party itself does not learn of the entry of judgment. Such a construction would make no distinction between notice of the entry of judgment and learning of the entry of judgment, although there are obvious differences between receipt by the at-

torney of notice of the entry of judgment and communicating this notice to the party in order that the party may make the decision whether to appeal. The party must determine whether an appeal is to be taken and this court should not sanction a construction which would require an attorney to act without authority in order to protect his client.

III. This Case Raises Important Issues Which Should Be Decided by This Court.

Respondent's second and final point is that there are no special and important reasons for granting the writ of certiorari. It would, indeed, be strange if Respondent argued differently. More forbearance than Petitioner possesses would be required for it to refrain from pointing out that it was not always thus. In its brief to the Court of Appeals, following Judge Castle's denial of its motion to dismiss the appeal, Respondent urged that the issue of the extension of time for appeal "raised an important question of practice and procedure going beyond the fortunes of this particular case." Petitioner agrees that it was an important question then and is now.

CONCLUSION.

For the foregoing reasons the writ of certiorari should be granted.

Respectfully submitted.

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